In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 181

JAMES ROBERT BURCHINAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 3) [1] is reported at 342 F. 2d 982.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1965 (R. 4). A petition for rehearing was denied on April 26, 1965 (R. 5, 6). The petition for a writ of certiorari was filed on May 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the record in the court of appeals; "Tr." to the transcript of the district court record.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support a conviction for fraudulent concealment and transfer of a corporation's funds where petitioner, as president and sole stockholder, sold about 30% of its merchandise within two months of the filing of an involuntary bankruptcy petition and transferred the proceeds to his wife's bank account beyond the reach of creditors.

2. Whether petitioner's failure to mention this transfer of corporate funds in the statement of affairs of the bankrupt corporation constituted a false oath under the Bankruptcy Act.

STATUTE INVOLVED

18 U.S.C. 152 provides:

* * * * *

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or
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> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; * * *
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> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was found guilty by a jury on two counts of an indictment in the United States District Court for the District of Colorado, charging (1) that he knowingly and fraudulently transferred and concealed the proceeds of a sale of corporate property in contemplation of bankruptcy and with intent to defeat the bankruptcy law, and (2) that he made a false oath regarding the same assets, in violation of 18 U.S.C. 152 (Tr. 3–5). He was sentenced to imprisonment for 10 days and probation for two years under count 2 and concurrent probation for two years under count 1 (Tr. 7–8). On appeal (Tr. 8–9) the conviction was affirmed (R. 4).

The evidence showed that petitioner was the president and sole stockholder of Factory Showroom, Inc., a retail furniture business in Denver, Colorado (Tr. 97, 57). The corporation experienced financial difficulties and a number of creditors obtained judgments against it in April and May, 1962 (Tr. 15, 21). Petitioner testified that by that time the corporation was $90,000 in debt and that he was unable to pay its obligations as they became due (Tr. 98–99).

In April 1962 petitioner discussed with Harold S. Stein, a merchandise liquidator, the sale of broken lots and damaged pieces of furniture. Petitioner asked for $11,000 or $12,000, but Stein considered the price too high (Tr. 22–23). On May 31, 1962 an attorney for judgment creditors advised petitioner that he was going to levy on the corporation's property to close down the business and delivered the necessary papers to the sheriff's office (Tr. 15–16, 34).

On that same date petitioner sold the furniture to Stein and received a check payable to the corporation for the $8,400 price (Tr. 24). It is this $8,400 that petitioner is charged with having unlawfully concealed and transferred (Tr. 3). Petitioner testified that the furniture sold represented between one-third and one-fourth of the corporation's total inventory (Tr. 101). Stein testified that the value of the merchandise purchased was approximately $14,000 (Tr. 28); petitioner informed an F.B.I. agent that it was worth $20,000 and was sold for less than 50% of its cost (Tr. 52).

On the same date (May 31, 1962) on which petitioner obtained the $8,400 check, petitioner's wife, using her maiden name, Charline McKenzie, endorsed and deposited it in a new bank account in the Littleton National Bank (Tr. 57, 58, 68). On June 4, 1962 the sheriff levied upon the corporation's remaining property which was appraised at $5,274.50 (Tr. 32–34, 55). Meanwhile bank officials questioned the endorsement of corporation checks by petitioner's wife before crediting her account, and asked for proof of her authority to endorse such checks. On June 6, 1962 petitioner and his wife obtained from an attorney a resolution giving Charline McKenzie the right to endorse the corporation's checks and delivered it to the bank (Tr. 59). Thereafter all checks on this account in the Littleton bank were disbursed to petitioner and his wife, and the account was depleted and closed on June 14, 1962 (Tr. 85, 80). Petitioner testified that from the $8,400 Stein check he received $2,000 (Tr. 103, 106). This sum was in addition to

$8,000 received by petitioner in 1962 as wages and a $3,000 loan from the corporation in 1962 (Tr. 102, 103).

On July 18, 1962 an attorney for creditors filed an involuntary petition in bankruptcy against the corporation (Tr. 19–20). On August 1, 1962, in the required statement of affairs of the bankrupt corporation, petitioner stated under oath that no property of the bankrupt had been transferred within the past 12 months other than in the ordinary course of business. Petitioner's failure to mention the $8,400 Stein transaction is the basis for the false oath charged in count 2 (Tr. 116, 119, 4). Petitioner did not reveal the Stein transaction to the attorney who prepared his bankruptcy schedules (Tr. 14), nor did he mention it in his testimony in the bankruptcy proceeding against the corporation (Tr. 116).

On February 26, 1963, petitioner told an F.B.I. agent that he had sold a "lot of goods to Mr. Stein and that the approximate value of these goods was $20,000; that he knew he was going under; that he sold these goods for $8,400 to get some ready cash"; and that he had deposited this money with other money in his wife's maiden name at the Littleton bank because "he was afraid his creditors would attach [these funds] if they were placed in the regular company bank account due to this apparent financial difficulty" (Tr. 48–49).

ARGUMENT

1. The sufficiency of evidence to show that petitioner had fraudulently transferred and concealed assets of

the corporation in violation of 18 U.S.C. 152 is not a question warranting review. When on May 31, 1962 petitioner sold to Stein between one-third and one-fourth of the corporation's entire inventory, he admittedly disposed of property for less than 50% of its cost in order to obtain ready cash to put in his wife's bank account so that the corporation's creditors could not attach these funds. The jury could reasonably infer that petitioner then contemplated that the corporation was so hopelessly insolvent that it would soon be forced by creditors into involuntary bankruptcy—an eventuality which occurred shortly thereafter. Cf. *Dean* v. *Davis*, 242 U.S. 438; *United States* v. *Shapiro*, 101 F. 2d 375, 379 (C.A. 7), certiorari denied, 306 U.S. 657; *Quinn* v. *Union National Bank*, 32 F. 2d 762, 766–768 (C.A. 8).

Petitioner's contention that the transfer was in good faith was rejected by the jury. The court charged that petitioner could "dispose of property in good faith while indebted to others" and prior to the filing of the bankruptcy petition, but only if he did so without intent to conceal assets from the bankruptcy court and without intent to defraud creditors (Tr. 121). The facts fully justify the jury's conclusion that the sale here was not in good faith.

2. Petitioner's failure to mention in the statement of the bankruptcy affairs the transfer to his wife of the funds derived from the Stein sale constituted a false oath violative of 18 U.S.C. 152. For a guilty verdict on count 2 the court's charge required a finding (1) that petitioner "made a false oath, in that he stated that no property of said Factory Showroom,

Inc. had been transferred, other than in the ordinary course of business within the last twelve months"; (2) that this was done "knowingly and willfully"; and (3) "with knowledge * * * that the statement was false in some material particular, as alleged" (Tr. 119). Implicit in the jury's verdict on this count is a finding that the sale and transfer of the corporation's property to Stein was not in the "ordinary course of business". This inference is entirely reasonable in view of the fact that the sale comprised about 30% of the corporation's entire retail furniture inventory for less than half of its cost—clearly an extraordinary business transaction.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1965.

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